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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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IN THE
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

FILED
COURT OF CRIMINAL APPEALS
5/9/2022
DEANA WILLIAMSON, CLERK

BRIAN CHRISTOPHER REED,
Appellant

VS.

THE STATE OF TEXAS,
Appellee

On the State's Petition for Discretionary Review
from the Tenth Court of Appeals in Case no. 10-19-00363-CR.
Reversing the Conviction in Cause no. 14-01090-CRF-361
in the 361st District Court of Brazos County, Texas.

STATE'S BRIEF ON THE MERITS

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TRIAL COURT:	Hon. Steve Smith Former Presiding Judge-361st District Court Current Justice-Tenth Court of Appeals

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IN THE
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STATE'S BRIEF ON THE MERITS

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, the State of Texas, by and through its District Attorney, and respectfully presents to this Court its brief on the merits in the above named cause, pursuant to the rules of the Court.

STATEMENT REGARDING ORAL ARGUMENT

The Court did not grant oral argument.

STATEMENT OF THE CASE

Appellant was charged with sexual assault. The jury found Appellant guilty

of the lesser-included offense of attempted sexual assault. (4 RR 164). A majority of the court of appeals found the jury-charge application instruction for attempted sexual assault was erroneous and resulted in egregious harm. The court of appeals remanded the cause for a new trial. *Reed v. State*, 608 S.W.3d 856 (Tex. App.—Waco 2020, pet. granted Mar. 16, 2022).

The State's motion for extension of time to file the State's Brief was granted until May 2, 2022.

GROUND FOR REVIEW

> The court of appeals erred in finding egregious harm, where the record is clear that the jury understood that a conviction for the lesser included offense of attempted sexual assault would be based on Appellant's attempted penetration of the victim's sexual organ by Appellant's sexual organ.

STATEMENT OF FACTS

1. Evidence at trial

M.K. testified she did not give consent to Appellant for him to place his penis in her vagina. (4 RR 6). M.K. stated that she did not give consent for Appellant to be in her bedroom and that Appellant did place his penis in her vagina. (4 RR 6).

M.K. stated that on October 2, 2013, she was an undergraduate student at Texas A&M. (4 RR 7). She was living in a condominium located on University Oaks and Olympia Way and owned by her parents. (4 RR 7, 9). It was her 23rd

birthday. (4 RR 7). The plan was to eat at the Wings N More and then go The Tap bar. (4 RR 10). She started drinking at dinner and continued to drink through the night. The Tap was located right by her condo. (4 RR 10). Her group of friends consisted of Cassidy Jackson, Brittany Griffin and Caitlin Scott. (4 RR 10-11). At The Tap, she did not remember ever talking to Appellant. (4 RR 11). She did not invite Appellant to her house after they left the bar. (4 RR 11). M.K. stated that she was highly intoxicated when she left the bar. (4 RR 12). Even though she lived next to The Tap, Brittany Griffin actually drove her home. (4 RR 12).

When she got home, she went straight upstairs to her bedroom and went to sleep. (4 RR 13). She always wore the same shirt (State's Exhibit 12) to bed and either wore pajama pants or panties. (4 RR 13). She did not remember if she was wearing pajama pants or panties the night of the offense, but she did not have anything on when she woke up. (4 RR 14).

The next thing she remembered was waking up and having a stranger on top of her. (4 RR 14). She remembered "screaming Caitlin's name and trying to throw him off of me and running to her room." (4 RR 15). She came out of her bedroom and saw Caitlin in the hall outside her bedroom. She went to Caitlin's bedroom; she heard Caitlin yelling. (4 RR 16). While in Caitlin's bedroom, she wondered "who it was and how they got into my bedroom." (4 RR 16). It finally registered what had happened, and she started crying hysterically. (4 RR 17). She initially

called an out of town friend named Dustine. (4 RR 17; Dustine Martindale: 4 RR 38). She then called her brother, Justin. (4 RR 18). Her brother said he would call her parents because "it was very emotional for me. But I also felt extremely bad for them to have to hear that that happened to their baby girl." (4 RR 19). She also called Cassidy, who had gone out with her that night. (4 RR 20). Cassidy came quickly, and she called the police. (4 RR 20).

M.K. then spoke to officers. (4 RR 21). She explained that she was still drunk at this time, and she was on a roller coaster of emotions: "I was hysterical and then I would go to kind of my personality of like joking when I'm upset and then I would go back to hysterical." (4 RR 21). She remembered going to the hospital and crying hysterically during the sexual assault exam. (4 RR 22). She said that "I remember I had to sit on the table with my legs like wide open for them to I guess like scrape to see if there was any DNA or anything. I remember feeling violated all over again." (4 RR 23). She felt that she needed to agree to the exam "[b]ecause I did not ask for that to happen in the first place. And so I knew that in order for them to catch him or whatever it may be that I had to do that all over again." (4 RR 24).

On cross-examination, she stated that she had two 32 ounce liquor drinks at Wings N More at around 8 p.m. (4 RR 26). Her group then went to The Corner Bar and took one shot of liquor. (4 RR 26). They left and went to The Tap around 9

p.m. or 10 p.m. and stayed until around 1:30 a.m. (4 RR 27). She drank Sprite with vodka and then maybe changed to beer after that. (4 RR 30). Brittany drove her home. (4 RR 27).

She remembered going to her bedroom; she did not go to the bathroom. (4 RR 30). She did not get ill that night because she "didn't wake up with a nasty taste in my mouth." (4 RR 34). She did not remember texting Caitlin at 3:25 a.m. and asking her to come to her bedroom. (4 RR 30).

After she woke up with a person on top of her, she pushed and rolled out of the bed. (4 RR 33). She was screaming Caitlin's name and screaming "I don't know who is in my room but I need them gone." (4 RR 33). She crossed paths with Caitlin in the hallway, and then went to Caitlin's bedroom.

M.K. did give statements to police where she sometimes said "he was trying to have sex with me." (4 RR 33). She did not take a shower before going to the hospital, but she did go to the bathroom. (4 RR 35). She was menstruating at the time of the offense, and she wore at tampon that night with the dress she had on. (4 RR 36). She did tell the police that she thought she thought she had a tampon, but she did not remember if she did and did not normally wear a tampon when she went to bed. (4 RR 36).

On re-direct, M.K. stated to the police that, although she said "he was trying to have sex with me," she immediately told the police that the man's penis was

inside of her. (4 RR 41). She would not have initiated sex with anyone because she was drunk and on her period. (4 RR 41).

Caitlin Scott stated that M.K. was her roommate when they both attended Texas A&M in 2013. (3 RR 16). They lived in a complex. During the night of October 2, 2013, they were celebrating M.K.'s birthday. (3 RR 17). They went to a bar called The Tap, which was near their apartment complex. (3 RR 17). Both had lot to drink that night. (3 RR 18). At The Tap, they met some guys that they did not know before that night. She remembered that the guys were from out of town attending the fire school. Caitlin spent most of the night talking to Trevor, who was attending the fire school. There was another guy named Brian, but she did not spend any time talking to him. (3 RR 19). Caitlin noticed that M.K. was leaning over the bar and thought that M.K. had had too much to drink. (3 RR 20). Appellant told Caitlin "I got her, I'll take care of her or something like that." (3 RR 22).

Between 1:30 and 2:00 a.m., they decided to leave. They had a friend named Brittany pick them up in her truck and drive them back to their apartment. (3 RR 22). The guys from the fire school did not leave with them. (3 RR 23). Caitlin remembered putting M.K. in her bed and putting M.K.'s phone on a charger. (3 RR 23). At that time, there was no one else in their apartment besides Caitlin and M.K. Although she did not remember it at trial, she told the police after the offense that

she texted Trevor and invited him over. (3 RR 23, 24). She did not expect anyone else to come over. (3 RR 24). A second guy did come with Trevor, and he asked to use the restroom. She later told the police that it was Appellant. (3 RR 25). Appellant then went upstairs to use the bathroom on the second floor of the apartment. (3 RR 25). M.K.'s bedroom was across the hall from that bathroom. (3 RR 26).

Caitlin stated that she fell asleep with Trevor watching TV. (3 RR 26). Caitlin woke up and heard M.K. yelling; she went upstairs to M.K.'s bedroom. (3 RR 27). Caitlin remembered that:

> The light was off and I just saw this guy in her room. From what I can remember I didn't really look much. I don't think he had his shirt on. He was right next to her bed or sitting on the edge of the bed and he just looked at me and said, I'm sorry, I don't know what I was doing.

(3 RR 27).

Caitlin remembered M.K.'s emotional state as Caitlin walked in:

> A. I think she was just really upset. I don't -- I was upset as well.
>
> Q. And I understand that and we're going to talk about that. Having listened -- do you remember [M.K.] crying?
>
> A. I do remember her crying.
>
> Q. And was she crying hard or not very hard?
>
> A. I think she was just very confused and crying like – I don't know, I don't know. She was just crying.

(3 RR 28).

Caitlin became upset and confronted Brian:

> A. I was just saying like, what the fuck are you doing? Why the fuck did you do that? And he was saying like, I don't know, I don't know. And I don't know if he was drunk or what, probably. And I said, get the fuck out of my house, and I was basically pushing him down the stairs and out the back door. Yeah, the back door.

(3 RR 29).

Caitlin went back to M.K. to find her really upset; they then decided to call the police. (3 RR 30). A friend of M.K.'s (Cassidy Jackson) came over. (3 RR 30). The police then came over in the middle of the night, spoke to Caitlin and Trevor and eventually took M.K. to the hospital. (3 RR 31).

On cross-examination, Caitlin agreed that, in her statement to the police, she said that she knocked on M.K.'s door when she went up to check on her. (3 RR 37). At trial, she did not remember what M.K. yelled out - that caused her to go up and check on her. (3 RR 38). When she entered M.K.'s room, she did not remember if Appellant was sitting or standing. (3 RR 38). In her statement to police, she said that she saw that Appellant was naked. (3 RR 39). She did recall telling Appellant "what the fuck are you doing. And then he said, I'm sorry, I don't know what I was doing or what I'm thinking or -- he was mumbling a lot as well." (3 RR 39). She told him to get out of her house; he did not just leave after she entered the room. (3 RR 40). She pushed Appellant out the back door. (3 RR 41). She did not remember what M.K. did after she entered M.K.'s room. (3 RR 41). She did not see the text message she received from M.K. at 3:25 a.m. until the police came to her apartment. (3 RR 42). She did not go upstairs to check on M.K.

due to the text message. Caitlin went upstairs due to M.K.'s voice.

On redirect, Caitlin confirmed that she did not see M.K.'s text message to her until she showed her phone to the police officer when, he was trying to determine what time they got home. (3 RR 44). She did not remember any time where she, Trevor and Appellant were sitting together in the living room. (3 RR 45). M.K. was in her bed when Trevor and Appellant arrived at her house. (3 RR 45).

On re-cross, Caitlin stated that it was possible that M.K. was in the bathroom throwing up when Appellant went upstairs. (3 RR 45).

Rick Vessell had previously worked as a detective for College Station Police and was assigned to investigate the offense. (3 RR 94). He investigated a sexual assault that had occurred at an apartment complex near the intersection of Dominik and Olympia Way in the City of College Station on October 3, 2013. (3 RR 95). He was called out at 4:00 a.m. to the College Station Medical Center, where the victim was located. (3 RR 96). He interviewed the victim. During the interview, M.K.'s emotions fluctuated from crying to laughing. (3 RR 97). Vessell stated that M.K. was intoxicated. (3 RR 97). He also spoke with the roommate, Caitlin. (3 RR 98). Caitlin provided a first name for the suspect and that he was staying at the Hilton Hotel. (3 RR 99). Between 4:30 and 5:00 a.m., he went to the hotel and loudly knocked on the door. (3 RR 101). After getting no response, he had the

Hilton front desk call the room. (3 RR 102). That was not successful. (3 RR 102). After continuing to knock, Appellant came to the door. (3 RR 103). Appellant was surprised that a police officer was at his door. When Vessell asked Appellant if he had gone to the apartment with Trevor, Appellant denied it. (3 RR 105). Appellant later said that he did go to a house with Trevor but left after four to five minutes. (3 RR 106). Appellant did not mention that he had had a sexual encounter with a girl named M.K. (3 RR 106-107). Vessell then read Appellant his *Miranda* rights because he was being detained. (3 RR 107). However, Appellant was not arrested at that time. (3 RR 107).

During the interview, Appellant initially told Vessell that he had only went into the apartment for four to five minutes. (3 RR 108). He then told Vessell that he did go in but sat on the couch and "bullshitted a bit." (3 RR 108). Vessell questioned Appellant as to whether he had had sex with M.K. (3 RR 109). Appellant denied going upstairs and promised Vessell that he had not had sex with M.K. (3 RR 109). Vessell told Appellant that he knew that Appellant had gone upstairs and that they had had sex. (3 RR 109). Specifically, Vessell told Appellant that M.K. had accused Appellant of raping her. (3 RR 109). Appellant continued to deny having sex at all. (3 RR 110).

Vessell told Appellant that he wanted Appellant's side of the story, because it was either consensual or it was not. (3 RR 109). It was Vessell who first

mentioned the word consent during the conversation. (3 RR 110). Eventually, Appellant admitted going upstairs to use the restroom, and he found M.K. inside the bathroom. (3 RR 110). Specifically, he found "some lady" "[l]aying like in a ball on the floor in front of the toilet and that she had just vomited everywhere. I think he used the word puked. And she was laying on her side -- how he described it." (3 RR 111). He also told Vessell that she was passed out drunk on the floor, and that she had had too much to drink on her birthday. (3 RR 111-112). Appellant said that he helped the woman up, flushed the toilet and helped her to her bedroom. (3 RR 112). Appellant now stated that the woman was kissing on his neck, and they ended up in the bedroom where she took her clothes off. (3 RR 112). Appellant then told Vessell that they had had consensual sex. (3 RR 113). Appellant denied putting his penis in her vagina. He also denied anal sex. (3 RR 114). Appellant told Vessell that he "ate her out" or had had oral sex. (3 RR 114). Vessell found that odd because M.K. was menstruating at the time, and he informed Appellant of that fact. (3 RR 114). Appellant then acknowledged that his penis might have gone in her vagina. (3 RR 114).

State's Exhibit 8 was a recording of Vessell's interview with Appellant; it was admitted and played for the jury. (3 RR 115). During the playing of the interview, Appellant said that "*we* went to The Tap, went to the house for just a little bit, and then *we* came back here." (3 RR 117) (emphasis added). Vessell said

that that raised a red flag for him, at the time of the interview, because he knew that Trevor was still at the condo. (3 RR 117). Vessell confirmed that he had misinformed Appellant, during the interview, that he had been picked out of a lineup. (3 RR 118). He said that because he wanted Appellant to believe that Vessell knew everything that had happened to "blocks his lies." (3 RR 118). During the interview, Appellant told Vessell that the only reason he ever ended up at that house in the first place was because Trevor was his ride and he had to go wherever Trevor was going. (3 RR 119). Appellant also jumped in his story, from finding some lady passed out to having consensual sex. (3 RR 119). Appellant told Vessell that he "ate her out" (3 RR 120) and that it stopped because "I must not have been doing a very good job." (3 RR 120). Appellant told Vessell that, when M.K. woke up, she said that she "[g]rabbed his head and pushed him off." (3 RR 121). Vessell noted that Appellant said he walked back to the hotel because Trevor had already left. (3 RR 124). Again, that was not true because Trevor was still at the condo when officers first arrived.

Vessell had a description of the person who had assaulted M.K. as wearing a blue-ish plaid shirt and jeans. (3 RR 125). After the interview, Appellant gave consent for Vessell to take possession of some of his belongings. (3 RR 124). Vessell identified the following items seized: State's Exhibit 9 (plaid shirt, blue and brown); State's Exhibit 10 (pair of blue jeans) and State's Exhibit 11 (gray

underwear). (3 RR 125-126).

Vessell noted that there was a dark colored stain on the inside of the crotch area, both the front and then down at the bottom of the inside of the crotch area of State's Exhibit 11. (3 RR 127). Vessell stated that he had seen stains like that before and opined that it was a bloodstain. (3 RR 127). He said that the bloodstain was high on the front of what would be the crotch of the defendant's underwear. (3 RR 127). Vessell knew that M.K. had been menstruating at the time of the assault, and he found it significant that there was a bloodstain on the inside of Appellant's underwear in the area of the crotch. (3 RR 128). That there was blood on Appellant's underwear was inconsistent with his story - that he did not place his penis near her vagina. (3 RR 128).

On cross-examination, Vessell stated that he initially interviewed M.K. and Caitlin at the hospital. (3 RR 130). Vessell knew that the suspect was from Oklahoma and was in town for the fire school. (3 RR 133). After those interviews, he went to the Hilton. (3 RR 132). Appellant eventually told him that he went upstairs, he found a girl in the bathroom who had had puked there. (3 RR 136). Appellant denied placing his penis inside her. (3 RR 138). Appellant stated that he remembered eating her out. (3 RR 138). Appellant told him that "she pushed me off, grabbed my head, pushed me off." (3 RR 142).

Vessell stated that the sheets from the bed were collected for purposes of DNA testing. (3 RR 145). There was a stain on the sheet. Appellant's duffel bag contained underwear. State's Exhibit 11 (grey underwear) was found inside a white plastic bag inside Appellant's duffel bag. (3 RR 148). Appellant was wearing a different pair of underwear when he was arrested and went to jail. (3 RR 148). Vessell did not send State's Exhibit 11 to be tested by the DPS crime lab. (3 RR 150, 155). He did not see the stain on the underwear at the time they were seized. (3 RR 151). The sheets from Appellant's hotel room had a stain in the middle that looked to be dried blood. (3 RR 152). They were seized.

Vessell stated that M.K. originally told the police officers that Appellant attempted to have sex with her. (3 RR 159). Vessell explained that is "the expression she's using, but she said his penis was in her vagina." (3 RR 159). Caitlin stated that, when she went into M.K.'s bedroom, she found Appellant sitting on the end of the bed. (3 RR 160).

Vessell noted that Appellant admitted to rubbing his penis on her vagina. (3 RR 160).

On re-direct, Vessell stated that it was a mistake not to send State's Exhibit 11 off to be tested. (3 RR 162). However, he said that DNA testing "doesn't show whether there's consent. It just shows whether an act happened." (3 RR 162). In this case, the identity of the person with M.K. in her bedroom was known. (3 RR

163). DNA would not help prove whether the sexual act was consensual. (3 RR 163). Vessell reiterated that Appellant repeatedly lied to him: Appellant stated that he did not have sexual contact with anyone; Appellant stated that he did not go upstairs in M.K.'s condo. (3 RR 165). Appellant was the only one who said that oral sex happened. (3 RR 169).

Again, State's Exhibit 11 (underwear) contained a bloodstain on the "the front under the waist band and below." (3 RR 169). That underwear was in the same bag with the same clothes that Appellant had on at M.K.'s condo.

Vessell stated that M.K. did make a statement to the effect that Appellant tried to have sex with her. (3 RR 170). He explained that "[s]he also said his penis was inside of her. But it's common -- that's a phrase commonly used. I've heard that before in investigations, tried to have sex with me. That doesn't mean it didn't happen." (3 RR 170). Vessell did not see any vomit on the camo shirt that M.K. was wearing. (3 RR 172).

On re-cross, M.K. told Vessell she was wearing a camo t-shirt and that she wore it every day. (3 RR 173, 175). He stated that "the only person I think that spoke of vomit was your client. Officer Clark looked in the bathroom for vomit and could not find any." (3 RR 176). Caitlin told him that she found Appellant naked in M.K.'s bedroom. (3 RR 177). M.K. told him that she woke up to Appellant's penis inside her vagina. (3 RR 174).

Dr. Nancy Downing stated that she practiced as a sexual assault nurse examiner at Baylor Scott & White in College Station and an associate professor in the College of Nursing at Texas A&M. (3 RR 47). She noted that she had taken care of "over 300 persons who have been impacted by sexual assault during medical forensic exams and also afterwards." (3 RR 48). She was familiar with studies about victim behavior and how victims of sexual assault respond to the trauma of sexual assault. (3 RR 48). She had also written a chapter in a book that discussed neurobiological changes that occur following sexual assault.

Downing stated that most sexual assaults do not result in bruises, genital injuries, abrasions and scars. (3 RR 48). Most patients report that they did not fight back because they were in shock:

> So the way the mind really responds to a traumatic event like that is that -- it's not prepared for that so really essentially that higher level order of thinking that we all do to reason really gets shut down by a lot of chemicals that are released when you're under intense stress and so you're focused on survival. And one way that people focus on survival is really to disassociate, meaning that they -- that they're not really able to fight back so it really isn't necessary often to physically fight somebody in order to commit a sexual assault.

(3 RR 48-49).

Having talked to many survivors and studied research, she opined that most victims do not violently fight off their attackers. (3 RR 51).

She also explained that examiners do not see physical injuries either in the anogenital area or on the body following sexual assault. (3 RR 49). She did not

expect to see injuries during a genital exam:

> Because that part of the body essentially was made for penetration, correct? That's how people have sexual intercourse with one another. So that part of the body is very stretchy. The opening to the vagina is very stretchy tissue. If somebody is not resisting because they either cannot or they disassociate, so to speak, because they're in a lot of trauma and they don't fight back, forceful penetration if somebody has to really fight somebody who is fighting back, you might see more injuries. But typically, as I said, people don't do that because they're mentally overwhelmed by the other person and so it's very common to not see injuries, even acutely.

(3 RR 50).

Downing stated that all survivors do not exhibit the same behavior during an exam because:

> there's a flood of chemical hormones that occur when somebody's experiencing intense fear. And some of those hormones can result in behaviors really that may look uncharacteristic or what you would not expect. It could make you look numb, it can make you look hysterical, or it can make you look completely calm.

(3 RR 52).

As a result, she had examined patients who came in, close in time to the assault, and who exhibited behavior where they were laughing, smiling or making jokes. (3 RR 52-53).

On re-direct, Downing stated that a victim normally first contacts another person after an assault, rather than call 911. (3 RR 65). She opined that if the victim were on her period, that could pose a problem recovering touch DNA from the vaginal canal because "a large amount of discharge that could dilute any foreign sample that's in the vagina, then that could make it -- the amount too small

to detect." (3 RR 67). She noted that, even if DNA is recovered, it does not establish whether the encounter was consensual. (3 RR 67-68). Instead, it would only establish identity. (3 RR 68).

On re-cross, Downing explained why a patient's verbal history is the most important piece of evidence to consider in a sexual assault examination, even if the victim had been drinking:

> A. [by Dr. Dowling] So let me first speak to the history as being the best evidence. So as a nurse the history of what a patient tells me is the reason they're seeking medical treatment, it's very critical to the treatment that I provide. So when I say history, I'm talking about what is the patient telling me because it is in her or his best interest to tell me exactly what happened to their body so that I can provide treatment. So –
>
> Q. [by defense counsel] Well, let me cut you off there. That's what I'm saying is it's in their best interest to tell you what happened, but if they've been drinking and don't really have a great recollection of what happened, that might not be -- I mean, it could be a little bit off, right?
>
> A. Alcohol can impair memory and coding. Research shows that people who have been drinking remember important details more than some of the peripheral details. But they do remember -- if something important happened to them they'll remember that something important happened to them. They might not remember all the details or in chronological order.
>
> Q. So -- I mean, you agree they might not remember all the details, might not remember the things leading up to that, and they suddenly snap to, they don't want that to happen, they say no, somebody quits, that's not sexual assault, is it?
>
> A. It would be unusual for somebody who -- a lot of people have sex when they have been drinking so it would be unusual for them to have sex when they're drinking and then state it was non-consensual if it were truly consensual. In my experience, people don't come in saying I was drinking and it was consensual. They wouldn't be seeking treatment.

(3 RR 72-73).

Downing stated that she did not review the records for the instant case; she only was providing her expert opinion of how patients behave following sexual assault. (3 RR 74).

On redirect, Downing explained penetration:

> the outside of a woman's genitalia -- so these would be our labia majora, so that hard fleshy part on the outside that protects the inner part. And then we have these labia minora which are the softer, fleshier lips before you get to the introitus of the vagina …. Anything inside the labia majora, so the labia minora and any of the structures surrounding there are also considered penetration. Anything within the lips of the harder labia majora is considered by our law to be penetration.

(3 RR 75).

On re-cross, Downing noted that a person having oral sex with the victim does not constitute penetrating the victim's sexual organ with the suspect's sexual organ, although it could constitute sexual assault under the statute. (3 RR 77).

Appellant's evidence during guilt-innocence

Officer Matthew Newton (College Station Police Department) stated that he took a statement from M.K.; she was intoxicated, but "she was clear in her thoughts and clear in her speech." (4 RR 61). She reported that she went from her room into Caitlin's room and then reported to Caitlin that there was some guy in her room. (4 RR 63). She did not say that the person tried to restrain her or that he tried to run off. (4 RR 63). She said that Appellant was completely naked, but he

did not remember if the victim said that she had clothes on at the time. (4 RR 65).

On cross-examination, Newton stated that M.K. told him that, when she woke up, this guy was on top of her with his penis was inside her vagina. (4 RR 66). Newton said that M.K. was an emotional wreck: "She would go from being able to communicate to sobbing uncontrollably back to being able to talk about what was going on and then again back to crying excessively again." (4 RR 66).

Appellant started working for Valero in Ardmore, Oklahoma in 2009. (4 RR 72). In 2013, he was sent to College Station to go to fire school. (4 RR 73). On October 3, 2013, he and others from Valero had finished the last day at fire school and later met at the hotel bar. (4 RR 77). Their group then went to Buffalo Wild Wings, to a pool hall, to a Mexican restaurant and then to The Tap bar. (4 RR 78). He did not remember how he got to The Tap bar. (4 RR 78). He was drinking alcohol at each location. (4 RR 77).

While at The Tap, Trevor (another Valero employee) was speaking to an individual. (4 RR 78). Appellant later rode with Trevor over to this individual's house. (4 RR 78). He and Trevor sat down on the couch in the downstairs living room. (4 RR 79). Appellant had to use the bathroom, and Caitlin told him that the bathroom was upstairs. (4 RR 80). When he arrived at the bathroom, there was a lady that was lying on her side on the floor. (4 RR 80). She had thrown up in the toilet. (4 RR 80). He asked her if she wanted help up and to get to her bedroom,

and she said yes. Appellant had seen her at The Tap and remarked that you probably had too much fun for your birthday. (4 RR 81). On the way there, she started kissing his neck, and he kissed her back. (4 RR 81-82). He then performed oral sex on her; she was awake and did not resist. (4 RR 82). The woman then placed "her hand on the back of my head and she picked my head up and she got up and left." (4 RR 82). The roommate then came in told him to "get the fuck out of my house." (4 RR 82). He was naked at the time. (4 RR 83). The roommate showed him down the stairs; he did not remember if she shoved him out the back or she told him to leave out the back. (4 RR 83). He dressed when he got to the bottom of the stairs. (4 RR 83). He did not see Trevor on the way out, and he walked back to the hotel. (4 RR 83). He did not place his penis in her vagina. (4 RR 83).

State's Exhibit 11 was Appellant's underwear found inside a white plastic bag inside his duffle bag at the hotel. (4 RR 84). Appellant explained that the stain on the underwear was from his vape pen (electronic cigarette). (4 RR 84). He had the vape pen in a pocket of some thin shorts that he wore under the fire gear he wore during the fire school. (4 RR 88). He wore the underwear under the shorts. The vape pen "leaked inside my shorts, in my shorts pocket." (4 RR 88). He did not wear that underwear when he later went out. (4 RR 89). He stated that that was not M.K.'s blood on his underwear. (6 RR 90). Appellant said that he did not tell

the officer that he had gone over to the house initially because he had been unfaithful to his wife. (4 RR 79).

On cross-examination, Appellant reiterated that the stains on the underwear were from juice that leaked from the vape pen. (4 RR 91). He agreed that the vape pen would have been in his left pocket. (4 RR 92). He also agreed that the stain on his underwear was not on the left (4 RR 93), but was on the center, front crotch of the underwear. (4 RR 92). He also agreed that the stain was on the inside of the underwear. (4 RR 93). He heard Det. Vessell opine that he believed it to be a blood stain, and that M.K., who had been menstruating, stated that Appellant had placed his penis in her vagina. (4 RR 94). He agreed that he did not talk to M.K. at The Tap, and she was a stranger. (4 RR 99). When he found this drunk, sick woman in the bathroom, she did not ask Appellant who he was or why he was in her house. (4 RR 102). Instead, she started kissing his neck and initiated sex with him, while she was on her period. (4 RR 103-104).

Appellant stated that he did not know that the woman was on her period because the room was dark. He did not have blood on his face and he did not get blood on his clothes. (4 RR 104).

Appellant agreed that it was a small group of people from Valero that left The Tap, not just Trevor and Appellant. (4 RR 106). Trevor did not drive Appellant over to the house. Instead, they used a cab or an Uber to get to the

house. (4 RR 107). Appellant knew that Trevor was going to the house to "hook up" with a girl. (4 RR 107). When asked why he went over to the house to begin with, when he could have just used the Uber to go back to the hotel, Appellant replied, "I can't remember the exact reason." (4 RR 107). He agreed that neither Caitlin nor M.K. invited him to their house. (4 RR 108). But he had seen M.K. at The Tap and knew that she had been drinking. (4 RR 109). He did not remember telling Caitlin, while at The Tap, "don't worry, I'll take care of her." (4 RR 109).

Appellant agreed that he initially lied to Det. Vessell when he told him that he had not gone upstairs and that he had not had sex with M.K. (4 RR 115, 117). He also lied when he told Vessell that he and Trevor just went to the house, bullshitted with them on the couch and then came back to the hotel. (4 RR 118). When Vessell told Appellant that the roommate saw him naked in M.K.'s room, Appellant lied and told Vessell that was not him. (4 RR 118). He now admitted that he was in M.K.'s bedroom. (4 RR 121). He lied to Vessell when he said that Trevor was his ride. (4 RR 123). He acknowledged that he asked Vessell what offense he was being charged with. (4 RR 122). He then, for the first time, told Vessell that he found some lady passed out on the floor, she had vomited, he helped her up, and everything was consensual. (4 RR 125). Appellant testified that the lady wanted it. (4 RR 128).

2. The jury charge

The record shows that the charge conference was off the record. (4 RR 133). Neither side objected to the charge. (4 RR 133-134).

Relevant portions of the **abstract instruction** are as follows:

> **I.**
>
> Our law provides that a person commits the offense of Sexual Assault, if the person intentionally or knowingly causes the penetration of the anus or sexual organ of another person who is not the spouse of the actor by any means[1], without that person's consent.

(4 RR 42).

The relevant **application paragraphs** stated:

> III.
>
> Now, if you find from the evidence beyond a reasonable doubt that in Brazos County, Texas, on or about October 3, 2013, the Defendant, BRIAN REED, did then and there intentionally or knowingly cause the penetration of the sexual organ of M.K. by the Defendant's sexual organ, without the consent of M.K., then you will find the Defendant guilty as charged in the indictment.
>
> Unless you so find beyond a reasonable doubt, or if you have reasonable doubt thereof, you will find the Defendant "not guilty" of Sexual Assault and go on to consider the lesser-included offense of Attempted Sexual Assault.[2]
>
> IV.
>
> Now, bearing in mind the foregoing instructions, if you find from the evidence beyond a reasonable doubt that on or about October 3, 2013 in

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1 As argued below, the court of appeals' harm analysis failed to appreciate that the phrase "by any means" was only included in the abstract instruction of the jury charge. It was not included in the application paragraph for attempted sexual assault.

2 As argued below, the court of appeals erred when it did not "read together" the main and lesser included application paragraphs. Instead, it limited its review of the charge to the abstract definition in question, with its "by any means" language.

> Brazos County, Texas, the Defendant, Brian Reed, did then and there, with specific intent to commit the offense of Sexual Assault do an act which amounted to more than mere preparation that tended but failed to effect the commission of the offense intended, you will find the defendant guilty of the lesser-included offense of Attempted Sexual Assault.

(CR 43-44).

The application paragraph for sexual assault properly tracked the indictment, where it alleged that Appellant "intentionally or knowingly cause[d] the penetration of the sexual organ of M.K. by the Defendant's sexual organ." (CR 43).[3] However, the application paragraph for attempted sexual assault did not include the language of "penetration of the sexual organ of M.K. by the Defendant's sexual organ."

3. Closing arguments

As to closing arguments, the State did not argue to the jury that it should consider finding Appellant guilty of any lesser-included charge:

> What you're going to see when you look at this jury charge is that there are options. One of them is a **Class C.** That's when someone grabs someone else's rear end. **That is not what we have here**. **The second is attempted sexual assault. But we know that's not what happened** here because he has blood on his underwear from when he put his penis inside of her and she was menstruating. That's what we know happened because she woke up to that.

(4 RR 138) (emphasis added).

Instead, it was Defense Counsel who argued that the jury should consider

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[3] The court of appeals acknowledged that the application portion of the jury charge for the main offense correctly tracked the indictment. *Reed v. State*, 608 S.W.3d at 860.

finding Appellant guilty of the lesser-included offense of attempted sexual assault, by attempting "to stick his penis in her vagina and was not successful":

> These lesser included -- you know, I think he's not guilty, but if you want to consider lesser includeds then you have to follow through this thing.
>
> **Now, attempted sexual assault would mean that he attempted to stick his penis in her vagina and was not successful. That's what that would mean.** The assault, which would be he touched her in some way that was offensive or provocative and she didn't want to be touched, that's the difference. You can read how that works. But basically how it works, if you cannot reach an agreement on the primary charge, a unanimous verdict of 12 jurors, then you fall back. And you keep falling -- if you can't reach a unanimous verdict on the attempted sexual assault, you fall back on that. You-all, I beg, I plead, you-all, to give this what's due.

(4 RR 150-151) (emphasis added).

A review of Defense Counsel's closing argument (4 RR 139-152) shows that Counsel did not mention Appellant's testimony about performing oral sex. Counsel did not argue to the jury that Appellant should be found guilty of attempted sexual assault by using his mouth to penetrate the complainant's sexual organ. In sum, Counsel abandoned that theory.[4]

A review of the State's initial (4 RR 134-139) and rebuttal (4 RR 152-163) arguments show that the prosecutors also did not address Appellant's testimony about performing oral sex. In fact, the very last argument made by the State to the jury before they began their deliberations was the following:

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[4] As argued below, the court of appeals erred in their harm analysis where it failed to acknowledge that Counsel abandoned that theory. *See Reed v. State*, 608 S.W.3d at 861-862.

> The Judge just told you that if you find from the evidence beyond a reasonable doubt that this defendant on that day put his penis in that woman's vagina and did not have her consent, then you -- and here's the key word, guys, you will find him guilty because, my friends, he is guilty and he deserves it and we're waiting on you.

(4 RR 163).

Thus, the State did not suggest that Appellant should be found guilty of attempted sexual assault by using his mouth to penetrate the complainant's sexual organ.

4. The court of appeals' opinion

On appeal to the Tenth Court, Appellant complained that the lesser-included application paragraph would allow the jury to find Appellant guilty of attempted sexual assault on additional facts because the *abstract* portion of the charge defined sexual assault as "intentionally or knowingly causes the penetration of the anus or sexual organ of another person who is not the spouse of the actor ***by any means***…." (Appellant's brief, p. 13). In support, Appellant relied on *Castillo-Ramirez v. State*, No. 04-18-00514-CR, 2019 Tex. App. LEXIS 7370, 2019 WL 3937270 (Tex. App.—San Antonio Aug. 21, 2019, pet. granted) (not designated for publication). However, *Castillo-Ramirez* involved the application paragraph *for the main offense* (not a lesser-included offense as in the instant case):

> Here, the indictment alleged Ramirez penetrated the complainant's anus with his sexual organ, while the jury charge allowed the jury to convict Ramirez if it found that Ramirez had penetrated the complainant's anus "*by any means*." (emphasis added). The jury charge enlarged the offense alleged and authorized the jury to convict Ramirez on a different theory than the one that was alleged in the indictment…. In this case, the State chose to only plead

> penetration by means of Ramirez's sexual organ. Because the State only pled this single manner and means of penetration, it may not rely on any other manner and means of committing the crime that it did not plead in the charging instrument. Therefore, we hold the trial court erred when it improperly broadened the indictment with a jury charge that authorized the jury to convict Ramirez of aggravated sexual assault for penetrating the complainant's anus without her consent by any means.

2019 Tex. App. LEXIS 7370, at *5-6.

In this case, the application paragraph for the main offense was correct and alleged that Appellant "intentionally or knowingly cause the penetration of the sexual organ of M.K. by the Defendant's sexual organ." (CR 43). Moreover, the application paragraph for the main offense was directly linked to the application paragraph for attempted sexual assault, by the following language:

> Unless you so find beyond a reasonable doubt, or if you have reasonable doubt thereof, you will find the Defendant "not guilty" of Sexual Assault and go on to consider the lesser-included offense of Attempted Sexual Assault.

(CR 43).

Notwithstanding, a majority of the court of appeals found that:

> Because the instruction on attempted sexual assault allowed the jury to consider the penetration of M.K.'s sexual organ by any means, including Reed's mouth, the jury charge improperly broadened the means by which the jury was authorized to convict Reed; thus, the charge did not comport with the indictment. And as such, there is a **significant possibility**[5] that Reed was convicted without the jury

[5] Although both parties addressed the opinion in *Castillo-Ramirez* (Appellant's brief, p. 14; State's brief, p. 36), the court of appeals did not. However, the court of appeals copied the term "significant possibility" and its conclusion from *Castillo-Ramirez*, which stated:

> Thus, the jury charge, considered in its entirety, improperly broadened the means by which the jury was authorized to convict Ramirez because the charge did not

> unanimously agreeing on the essential fact that he tried, but failed, to penetrate M.K.'s sexual organ with his sexual organ. *See Abdnor*, 871 S.W.2d at 731 ("[A]n erroneous or an incomplete jury charge jeopardizes a defendant's right to jury trial because it fails to properly guide the jury in its fact-finding function.").

Reed v. State, 608 S.W.3d at 861. (emphasis added).

In dissent, Chief Justice Gray argued that the error was harmless and explained why the majority's harm analysis fell short:

> In conducting the evaluation, the Court reviews the arguments of counsel. In my analysis, on this record, I apparently weigh that factor much more heavily than does the Court. In particular, no one argued that any manner and means of attempted sexual assault other than penetration with his sexual organ would support a conviction on the lesser included charge. In fact, no other manner and means of committing sexual assault was even eluded to during arguments. The State was going for broke, Sexual Assault, and spent no time arguing the lesser included when clearly the evidence would have supported such an argument. In summary, the State's argument for the lesser included could have been something like:
>
> > He stalked her from the restaurant, to the bar, to her home, to her bedroom. There he removed her clothes, he removed his clothes, he prepared her, and then got on top of her. But then she woke up and realized what was happening and fought him off. At the very least, he committed attempted sexual assault.

> comport with the indictment. This charge error created the **significant possibility** that Ramirez was convicted without the jury unanimously agreeing on the essential fact that he penetrated the complainant's anus with his sexual organ. *See Abdnor*, 871 S.W.2d at 731 ("[A]n erroneous or an incomplete jury charge jeopardizes a defendant's right to jury trial because it fails to properly guide the jury in its fact-finding function.").

Castillo-Ramirez v. State, No. 04-18-00514-CR, 2019 Tex. App. LEXIS 7370, at *8, 2019 WL 3937270 (Tex. App.—San Antonio Aug. 21, 2019, pet. granted) (not designated for publication) (emphasis added).

> But that was not argued by the State. The State argued only for a conviction for sexual assault.
>
> The Court also discusses the arguments by the defendant. The defendant's arguments were correct and properly limited the jury's consideration to the lesser included theory of sexual assault charged in the indictment, penetration with his sexual organ. The defendant argued that "attempted sexual assault would mean that he attempted to stick his penis in her vagina and was not successful." Thus, it is not that the jury was without guidance on the limitation of the theory on which they could properly convict the defendant. It could be said that the defendant actually argued the hypothetically correct charge.

Reed v. State, 608 S.W.3d at 863.

SUMMARY OF THE ARGUMENT

The application paragraph for attempted sexual assault did not include "penetration of the sexual organ of M.K. by the Defendant's sexual organ." However, the error was harmless. The application paragraph for the lesser-included offense of attempted sexual assault did not improperly broaden the indictment because it did not apply "by any means" within the paragraph. Moreover, the defensive theory was that the victim consented, not means of penetration as the court of appeals erroneously determined. Because the contested issue was consent, neither party argued Appellant's testimony about his alleged act of performing oral sex. And during closing argument, Defense Counsel explained that "attempted sexual assault would mean that he [Appellant] attempted to stick his penis in her vagina and was not successful." Thus, the jury understood that a conviction for the lesser included offense of attempted sexual assault would be based on Appellant's attempted penetration of the victim's sexual organ by Appellant's sexual organ.

ARGUMENT

When assessing harm, a majority of the court of appeals failed to properly analyze each factor and attribute the appropriate weight to the various factors in light of the facts. Its conclusion of egregious harm is not supported by the record of the trial as a whole. The courts' adoption of a "significant possibility" test led it to determine egregious harm based on a finding of theoretical harm.

Applicable Law

Because Appellant did not preserve the jury charge error at trial, the reviewing court must conduct an egregious harm analysis. *See Arline v. State*, 721 S.W.2d 348, 351 (Tex. Crim. App. 1986). Reversal for an unobjected-to erroneous jury instruction is proper only if the error caused actual, egregious harm to an appellant. *Arrington v. State*, 451 S.W.3d 834, 840 (Tex. Crim. App. 2015). "An egregious harm determination must be based on a finding of actual rather than theoretical harm." *Cosio v. State*, 353 S.W.3d 766, 777 (Tex. Crim. App. 2011). A "[j]ury-charge error is egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory." *State v. Ambrose*, 487 S.W.3d 587, 597 (Tex. Crim. App. 2016). Egregious harm is a difficult standard to meet, and the analysis is a fact-specific one. *Villarreal v. State*, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015).

When assessing harm based on the particular facts of the case, the reviewing court considers: (1) the entirety of the jury charge, (2) the state of the evidence, (3) counsel's arguments, and (4) any other relevant information revealed by the entire trial record. *State v. Ambrose*, 487 S.W.3d at 598.

Selected cases

In *Alcoser v. State*, No. PD-0166-20, 2022 Tex. Crim. App. LEXIS 186, 2022 WL 947580 (Tex. Crim. App. Mar. 30, 2022), this Court affirmed a defendant's conviction for family violence assault with a prior conviction because the defendant had not suffered any harm as a result of error in the charge, including: that the definition of "knowing" was wrong; that the statutory definition "reasonable belief" should have been included in the charge; that the self-defense instruction was incorrectly placed after the application paragraph; and that the application paragraph was incomplete. *Id.* at Tex. Crim. App. LEXIS 186, *15-20. No harm had occurred because "they were either harmless or were not points of contention that were litigated at trial, rendering the risk of egregious harm, as we have mentioned, only a theoretical one." *Id.* at Tex. Crim. App. LEXIS 186, *25.

In *Gonzalez v. State*, 610 S.W.3d 22 (Tex. Crim. App. 2020), this Court affirmed a defendant's conviction for aggravated assault on a public servant because the defendant had not suffered any harm as a result of error in the charge, namely: the erroneous inclusion of recklessness in the application paragraph, rather

than as a separate lesser-included-offense instruction. *Id.* at 26. No harm had occurred because "such error is a mere formatting defect that did not substantively affect the jury's consideration of Appellant's case and as such did not cause egregious harm." *Id.* at 26.

Review of factors with discussion

(1) the entirety of the jury charge

The application paragraph for the main offense was correct and alleged that Appellant "intentionally or knowingly cause the penetration of the sexual organ of M.K. by the Defendant's sexual organ." (CR 43). An offense is a lesser-included offense if it consists of an attempt to commit the offense charged. Tex. Code Crim. Proc. art. 37.09(4). Again, the application paragraph for the main offense was directly linked to the application paragraph for attempted sexual assault by the following language:

> Unless you so find beyond a reasonable doubt, or if you have reasonable doubt thereof, you will find the Defendant "not guilty" of Sexual Assault and go on to consider the lesser-included offense of Attempted Sexual Assault.

(CR 43).

Thus, the application paragraphs - when read together - instructed the jury that, after having considered the main charge of sexual assault (penetration of the complainant's sexual organ by Appellant's sexual organ), it should "go on to consider" the lesser included offense of attempted sexual assault - attempted

penetration of the complainant's sexual organ by Appellant's sexual organ. Defense Counsel explained this to the jury: "attempted sexual assault would mean that he [Appellant] attempted to stick his penis in her vagina and was not successful." (4 RR 150-151). The State did not object or rebut counsel's explanation. And Counsel ultimately argued for the jury to consider finding Appellant guilty of the lesser-included offense of attempted sexual assault. (4 RR 151).

The court of appeals erred in when it did not read the application paragraphs together. Instead, it limited its review of the charge to the abstract definition in question ("by any means"):

> the instruction on attempted sexual assault merely references the generic definition for sexual assault, which, as defined in the charge, encompasses the penetration of the anus or sexual organ of another person who is not the spouse of the actor *by any means*, without that person's consent. In other words, the instruction on attempted sexual assault improperly broadened the indictment by alleging a manner and means that were not plead in the indictment.

Reed v. State, 608 S.W.3d at 860.

However, the application paragraph for the lesser-included offense of attempted sexual assault did not improperly broaden the indictment because it did not apply "by any means" within the paragraph. As noted in *Lewis v. State*, 815 S.W.2d 560 (Tex. Crim. App. 1991), this Court explained that an abstract instruction, without specific application to the facts of the case, did not authorize an improper conviction:

> …a panel of this Court held that an abstract instruction on the law of "parties," without specific application to the facts of the case, did not authorize the jury to impose criminal responsibility for the conduct of another. Accordingly, the panel held that overruling an appellant's objection to submission of the abstract instruction was not error. *Mauldin v. State,* 628 S.W.2d 793, 796 (Tex.Cr.App. 1982) (panel opinion).

Lewis v. State, 815 S.W.2d at 562.

Here, the instant jury was not authorized to find Appellant guilty on additional facts—that he used his mouth to penetrate the victim's sexual organ—where said abstract definition of sexual assault contained in the charge was not applied to the application paragraph for the lesser-included instruction on attempted sexual assault. And as explained in the dissenting opinion, "the error was harmless. Not only would the jury have to go through the mental gymnastics described, which is against the logical flow of the charge, it is the evidence and the arguments that convinces me that the defendant was not harmed by the error in the charge." *Reed v. State*, 608 S.W.3d at 863. (Gray, C.J., dissenting). In sum, the court of appeals' belief, that "by any means" played any role in the jury's decision, is a theoretical one when a total reading of the jury charge is considered.

Finally, the court's holding (that there was "a significant possibility" that Appellant was convicted without the jury unanimously agreeing on the essential fact that he tried, but failed, to penetrate M.K.'s sexual organ with his sexual organ), is in conflict with the correct standard: "An egregious harm determination must be based on a finding of actual rather than theoretical harm." *Cosio v. State*,

353 S.W.3d at 777. The court of appeals' adoption of a "significant possibility" test seems to resurrect the "logical possibility" test previously rejected by this Court in in *Black v. State*, 723 S.W.2d 674 (Tex. Crim. App. 1986), which held that harm is not shown because there is a "logical possibility":

> In *Almanza*, *supra*, this Court made it clear that charging error must be reviewed in the context of the entire record. Second, Judge Teague prefers to apply theoretical generalities to all cases rather than realistic probabilities to particular cases. That approach returns this Court to pre-*Almanza* law, requiring automatic reversal of convictions for technical charging error, regardless of individual records. Third, even if Judge Teague's "logical possibility" test was appropriate, it incorrectly presumes that a jury would convict a defendant as a party even in the face of sufficient evidence to convict him as a principal. That presumption is itself illogical.

Black v. State, 723 S.W.2d at 675 n.2.

The State submits that the majority's use of a "significant possibility" test improperly resulted in an egregious harm determination based on theoretical harm.

(2) the state of the evidence

The evidence was legally sufficient to support the jury's verdict for attempted sexual assault, by Appellant attempting to penetrate the sexual organ of M.K. with his penis. Appellant told Vessell that his penis might have gone in her vagina (3 RR 114) and that he rubbed his penis on M.K.'s vagina. (3 RR 160).

(3) counsel's arguments

As noted above, Defense Counsel argued to the jury that it should consider finding Appellant guilty of the lesser-included offense of attempted sexual assault:

> These lesser included -- you know, I think he's not guilty, **but if you want to consider** lesser includeds then you have to follow through this thing.
>
> **Now, attempted sexual assault would mean that he attempted to stick his penis in her vagina and was not successful. That's what that would mean.** The assault, which would be he touched her in some way that was offensive or provocative and she didn't want to be touched, that's the difference. You can read how that works. But basically how it works, if you cannot reach an agreement on the primary charge, a unanimous verdict of 12 jurors, then you fall back. And you keep falling -- if you can't reach a unanimous verdict on the attempted sexual assault, you fall back on that. You-all**,** I beg, I plead, you-all, to give this what's due.

(4 RR 150-151) (emphasis added).

Counsel's argument (that attempted sexual assault would mean that he attempted to stick his penis in her vagina and was not successful) was not refuted by the State.

Most importantly, and as explained below, Counsel did not discuss Appellant's testimony about his alleged act of performing oral sex. It was a non-issue during argument and was not raised as a defensive theory.

4) any other relevant information revealed by the entire trial record

Beginning with jury selection, Defense Counsel acknowledged to the venire that the sole contested issue at trial was **consent**:

> So what they have to prove beyond a reasonable doubt is that back on October 3, 2013 - on or about – he intentionally or knowingly caused his sexual organ to penetrate the sexual organ of the alleged victim. That's the elements of this crime. And the State has to prove all that to you beyond a reasonable doubt without the effective consent of the victim. And that's the big part. That's what Ryan said, and I think a lot of these cases boils down to consent.

(2 RR 125).

However, the court of appeals did not consider consent as a defensive theory when determining if the jury-charge error "vitally affects a defensive theory." *State v. Ambrose*, 487 S.W.3d at 597. Instead, it found that "[t]he record reflects that the **means of penetration** was contested throughout trial." *Reed v. State*, 608 S.W.3d at 861. (emphasis added). Thus, the court of appeals viewed Appellant's testimony concerning oral sex as going to rebut penetration of the female sexual organ with his penis. But that was not the reason why he testified to having oral sex. Appellant testified to having oral sex to explain that the victim initially consented.

To rebut M.K.'s denial of consent (4 RR 6), Appellant testified to the jury that he *eventually*[6] told Vessell that he found some lady passed out on the floor, she had vomited, he helped her up, and everything was consensual. (4 RR 125). Appellant testified that the lady wanted it. (4 RR 128). To add credibility to that claim, Appellant told Vessell that the woman was kissing on his neck and they ended up in the bedroom where she took her clothes off. (3 RR 112). Appellant then told Vessell that they had had consensual sex. (3 RR 113). Appellant denied putting his penis in her vagina. He also denied anal sex. (3 RR 114). But Appellant

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[6] Initially, Appellant denied going upstairs and promised Vessell that he had not had sex with M.K. (3 RR 109). Vessell told Appellant that he knew that Appellant had gone upstairs and that they had had sex. (3 RR 109). Vessell told Appellant that he wanted Appellant's side of the story, because it was either consensual or it was not. (3 RR 109). It was Vessell who first mentioned the word consent during the conversation. (3 RR 110). Eventually, Appellant admitted going upstairs to use the restroom, and said he found M.K. inside the bathroom. (3 RR 110).

told Vessell that he had oral sex. (3 RR 114). During closing arguments, Counsel argued to the jury that the victim consented: "I'm sure at some point [M.K.] thinks something happened. But the thing is, is that prior to that it was consensual. And when she decided no -- hold on, I don't want to do this, he stops. That's not [M.K.] being a liar, it's being intoxicated." (4 RR 148).

In sum, "no one argued that any manner and means of attempted sexual assault other than penetration with his sexual organ would support a conviction on the lesser included charge. In fact, no other manner and means of committing sexual assault was even eluded to during arguments." *Reed v. State*, 608 S.W.3d 863 (Gray, C.J., dissenting). It is clear that the jury understood that a conviction for attempted sexual assault would be based on Appellant's attempted penetration of the victim's sexual organ by Appellant's sexual organ. The majority failed to properly analyze each factor, and its ultimate conclusion is not supported by the record, but instead based on theoretical harm.

PRAYER

Wherefore, the State of Texas prays that the Court of Criminal Appeals reverse the decision of the court of appeals as to point of error no. 1 and remand the case back to the court of appeals so that it may address the remaining points of error.[7]

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the State's Brief on the Merits was emailed to: Mary Hennessy, Attorney for Appellant, at mhennessy.attorney@gmail.com, and the State Prosecuting Attorney, at information@spa.texas.gov on this the 2nd day of May, 2022.

/s/ Douglas Howell, III

CERTIFICATE OF COMPLIANCE WITH TEX. R. APP. P. 9.4

I certify that the forgoing document has a word count of 10,778 based on the word count program in Word for Microsoft Office 365.

/s/ Douglas Howell, III

[7] The court of appeals did not address Appellant's remaining issues, believing that the first issue was dispositive in the outcome of this appeal. *Reed v. State*, 608 S.W.3d at 862 n. 3.